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Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,
v.
WILLIAM R. LUCAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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QUESTION PRESENTED

Whether a federal employee may be denied the right to maintain a Bivens action against his superiors to redress the violation of his First Amendment right to free speech.

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INTEREST OF AMICUS CURIAE [1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally-protected rights. Among the most important of those mechanisms is a cause of action for damages against those federal officials who violate the constitutional rights of their fellow citizens. The decision below would deny this customary and necessary remedy to the three million Americans who work for the federal government. The ACLU submits this

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1/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

brief amicus curiae, in support of petitioner, to urge the Court to preserve the damage remedy for federal employees who are deprived of their constitutional rights.

STATEMENT OF THE CASE

Petitioner, William C. Bush, is an aerospace engineer who is employed as a career civil servant by the National Aeronautics and Space Administration at the Marshall Space Flight Center in Alabama. During the course of a personnel reorganization in 1974, the Center's management assigned petitioner to a new position. Petitioner voiced objections to the reassignment through agency channels, stating that the position to which he had been assigned lacked any duties of consequence. He appealed the reassignment to the Civil Service Commission ("CSC"), and, during the pendency of the appeal, spoke out concerning the lack of productive work in

the new position and the apparent misuse and waste of federal funds.

In June, 1975, after the reporting of petitioner's views in the media, respondent, the Director of the Center, stated during a press conference that he had ordered an investigation of petitioner's statements and that they had no basis in fact. Less than two months later, a personnel action was initiated against petitioner. Respondent, charged with decision-making authority in such matters, reduced petitioner in grade from GS-14 to GS-12. Petitioner appealed this decision to the CSC and was ultimately restored to his former grade and awarded back pay.

Prior to this favorable decision, petitioner had filed suit in state court, claiming, inter alia, that respondent had conspired with others to demote petitioner in retaliation for the exercise of his First

Amendment rights. Respondent removed the case to the United States District Court for the Northern District of Alabama, and moved for summary judgment. The district court granted the motion [2] and the court of appeals affirmed. [3] Petitioner then filed a petition for a writ of certiorari in this Court. Bush v. Lucas, No. 79-1044. The Court summarily granted the petition, vacated the court of appeals' decision, and remanded the case for further consideration in light of Carlson v. Green, 446 U.S. 14 (1980). 446 U.S. 914 (1980).

On remand, the court of appeals reaffirmed the prior summary judgment in favor of respondent, finding that this Court's decision in Carlson did not require a dif-

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2/ Appendix D to Petition for Writ of Certiorari.

3/ Appendix C to Petition for Writ of Certiorari (reported at 598 F.2d 958 (5th Cir. 1979)).

ferent result. Appendix A to Petition for Writ of Certiorari [hereinafter cited as Pet. App.]. 4/ Petitioner again filed a petition for a writ of certiorari, which was granted by this Court on June 28, 1982. 102 S. Ct. 3481.

SUMMARY OF ARGUMENT

The decision below contravenes the principles laid down in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Carlson v. Green, 446 U.S. 14 (1980). In those cases, this Court established that citizens victimized by federal officials' unconstitutional acts are presumed to have an action for damages against those officials. Such an action can be defeated only when defendants

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4/ The court of appeals decision is reported at 647 F.2d 573 (5th Cir. 1981).

(1) demonstrate "special factors counselling hesitation" against a damage action or (2) show that Congress has provided an alternative, "equally effective" remedy that it intended to substitute for a Bivens action. Neither of the exceptions is present here.

The relationship between the federal government and its employees does not constitute a "special factor" that defeats petitioner's right to maintain a Bivens action. In finding this relationship to be a bar to suit, the court of appeals misconceived this Court's narrow formulation of the "special factors" standard. The Court's decisions make clear that a damage remedy is not to be defeated simply because there exists a countervailing governmental interest or a perceived tension between vindication of constitutional rights and governmental objectives. Only in extraordinary cases raising an irreconcilable clash between personal

accountability and functions textually committed under the Constitution to particular federal officers is there a need for a complete bar to suit.

Even if the decision below had applied the proper "special factors" standard, the court of appeals erred in finding "special factors" present in this case. None of the three considerations identified below can serve as a basis for denying federal employees the right to maintain a damage action to redress constitutional violations. First, the administrative remedies available to federal employees cannot be a "special factor" because they are properly considered only under the second branch of the Carlson test as an "alternative remedy." The remedies in question fail to qualify under that second branch, and must not be permitted to masquerade as a "special factor" under the first part of the Carlson formulation.

Second, the status of federal employees in no way detracts from their entitlement to maintain Bivens actions. There is nothing about the relationship between federal officers and their subordinates that justifies closing the courthouse doors to the approximately three million citizens in federal service. The government's interest in efficiently managing its personnel can be safeguarded through the less severe means of affording defendants qualified immunity or by firmly applying the rules of procedure to cull out insubstantial lawsuits at the threshold. The court of appeals decision effectively revives the long-discredited view that public employment is a "privilege" that limits the ordinary rights of a citizen. It also creates an unprincipled distinction between the remedies available to

federal employees and those available to state and local employees under 42 U.S.C. § 1983 and to employees of the legislative branch under Davis v. Passman, 442 U.S. 228 (1979).

Finally, the nature of the substantive right here at issue -- the First Amendment right to free speech -- is not a "special factor." The balancing of public employees' First Amendment rights mandated by the Pickering decision is no different in principle from that called for in the Court's other First Amendment cases. If the nature of First Amendment rights is at all relevant, their pre-eminent stature is an element that weighs in favor of confirming the Bivens cause of action for federal employees.

Nor can the government carry its burden under the second branch of the Carlson test, for Congress has enacted no "equally effective" alternative statutory remedy to

preempt the Bivens action. In Carlson, this Court found the Bivens action more effective than the Federal Tort Claims Act remedy because of four factors: Bivens' deterrent effect, the availability of punitive damages, the right to trial by jury, and uniformity of standards for vindicating constitutional rights. The instant case has these same factors and adds one, the availability of compensatory damages. The enormous disparity between the relief afforded by a Bivens action and that provided under civil service statutes explains the government's failure to identify any indication of intent on the part of Congress -- or even discussion of the issue -- to preempt the Bivens action for federal employees.

ARGUMENT

UNDER THE CRITERIA OF CARLSON V. GREEN, FEDERAL EMPLOYEES ARE ENTITLED TO PURSUE BIVENS ACTIONS TO REDRESS VIOLATIONS OF THEIR CONSTITUTIONAL RIGHT TO FREE SPEECH.

This Court has declared that victims of federal officials' unconstitutional acts are presumed to have a cause of action for damages against those officials arising directly under the Constitution. Carlson v. Green, 446 U.S. 14, 18 (1980); Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). This traditional means of securing redress for constitutional violations can only be defeated when (1) "defendants demonstrate 'special factors counselling hesitation in absence of affirmative action by Congress'"; or (2) "defendants show that Congress has provided an alternative remedy

which it explicitly declared to be a substitute for recovery directly under the Constitution, and viewed as equally effective." Carlson, 446 U.S. at 18 (emphasis in original). Neither of the exceptions is present here.

The court of appeals, after remand by this Court, determined that a Bivens remedy should be denied to petitioner and other federal employees like him because of the existence of "special factors." These "special factors" identified by the court were (1) the administrative remedies provided for the contesting of personnel decisions; (2) the nature of the relationship between the federal government and its employees; and (3) the character of the First Amendment rights of government employees. Pet. App. a-6 to a-12.

As set forth below, the court erred in so finding, for no "special factors" exist that warrant extinguishing the right of federal employees to the Bivens cause of action. Although the court of appeals did not reach the question of whether Congress provided an alternative, equally effective remedy, the government argued below that the administrative remedies provided federal employees are a "substitute" for a Bivens remedy and have been so declared by Congress. See Supplemental Brief for Appellee, Bush v. Lucas, No. 77-1615 (5th Cir.) at 34-38 [hereinafter cited as Supp. Br.]. This argument is without merit, for the remedies urged by the government can in no way compare with a Bivens action.

I. No "Special Factors" Warrant Defeating the Right of Federal Employees to Pursue a Bivens Action.

A. The Court of Appeals Misconceived this Court's Formulation of the "Special Factors" Standard.

In refusing to recognize a Bivens cause of action in favor of federal employees, the court of appeals grounded its decision on the availability of alternative remedies to contest wrongful personnel actions, on the wide discretion traditionally afforded to the government in handling its own personnel matters, and on limitations placed on the First Amendment rights of public employees. Pet. App. a-6 to a-12. In the court's view, the relationship between the federal government and its employees is so fragile and highly regulated that it would be unduly impaired by affording injured civil servants a right of action to remedy constitutional violations committed by their superiors. As

set forth below, this analysis misconceives the narrow formulation of the "special factors" standard laid down by this Court.

At the outset, it must be recognized that the consequences of finding "special factors" are draconian. Such a finding interposes a complete bar to a civil suit for damages and confers on federal officials the equivalent of absolute immunity. It extinguishes the complainant's right of action and closes off access to the courts in every case even "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights . . . ." Harlow v. Fitzgerald, 102 S. Ct. 2727, 2739 (1982).

Mindful of the severity of finding "special factors," this Court has articulated a standard that reserves "special factors" for truly extraordinary cases where the mere

threat of litigation and personal accountability would impinge upon the constitutional prerogatives of officials in coordinate branches of government. This approach was made clear in Davis v. Passman, 442 U.S. 228 (1979), in which the Court held that even members of Congress are liable in damages for actions taken in the course of their work, provided that the conduct falls outside the protections of the "speech and debate" clause. Id. at 228. Likewise, the decision in Carlson rejected the "special factors" argument of federal officers who lacked "independent status in our constitutional scheme." 446 U.S. at 19. This was so even though "requiring them to defend the respondent's suit might inhibit efforts to perform their official duties . . . . " Id.

These decisions make clear that the traditional remedy of damages for constitutional violations is not to be defeated simply because there is a countervailing government interest. They reflect the Court's considered judgment that the "special factors" test is to be used only in the cases demonstrating irreconcilable incompatibility between the prospect of damage suits and the performance of official responsibilities entrusted under the Constitution to functionaries in the coordinate branches. Cf. Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982). The rationale is that only in such cases is there a need for a complete, threshold bar to suit. On the other hand, where the constitutional prerogatives of government officials can be safeguarded by affording them qualified immunity for discretionary acts, as in Carlson, or by granting protection under the speech and debate

clause for legislative acts, as in Davis, there is no justification for denying access to the courthouse to injured persons seeking redress for invasions of their constitutional liberties. Cf. Harlow v. Fitzgerald, supra.

Tne "special factors" identified in the decision below are very different from those identified in Bivens, Davis, and Carlson. The court of appeals focused on civil service remedies, the high degree of oversight and control that characterizes the employer-employee relationship in federal service, and the circumscribed nature of government employees' First Amendment rights. But those are not the sort of "special factors" recognized in this Court's decisions. Indeed, the court of appeals nowhere undertook to determine whether any of these considerations evidenced an unresolvable clash between civil liability and due respect for the constitutional prerogatives of officials in the

coordinate branches that could not be accommodated through an appropriate degree of official immunity.

Nor could the court of appeals have properly reached such a determination. If anything, the availability of incomplete administrative remedies, the high degree of control that federal officers exercise over their subordinates, and the established right of government employees to speak out on issues of public concern weigh strongly in favor of, not against, the recognition of a damage action to vindicate constitutional rights.

Moreover, acceptance of the court of appeals' loose formulation of "special factors" would trivialize the importance of damage actions in achieving compensation for the violation of constitutional rights and in deterring future unconstitutional misconduct. According to the court of appeals, the doors of the courthouse can be shut to

injured federal employees whenever a court perceives that there is a tension between governmental objectives and personal accountability. This is so even though the government's interests can be safeguarded by the less drastic means of affording defendants qualified immunity or by firmly applying the rules of procedure in a manner calculated to cull out insubstantial lawsuits at the threshold. See Harlow, supra, 102 S. Ct. at 2736-38; Butz v. Economou, 438 U.S. 478, 507-08 (1978). The court of appeals' formulation radically reworks the balance struck by this Court and jeopardizes the right of citizens to redress violations of their fundamental liberties.

In any event, even if the decision below had accepted the "special factors" standard set forth in Davis and Carlson, the court of appeals erred in finding "special factors" present in this case. As shown below, none

of the considerations identified by the court supports a judgment that the right of citizens to pursue an action for damages for the invasion of their constitutional liberties should be denied to federal employees. The court of appeals' decision exaggerates the conflict between personal accountability and the accomplishment of governmental objectives, and should be rejected.

B. The Administrative Remedies Available to Federal Employees Are Not a "Special Factor."

The court of appeals found that the administrative remedies available to federal employees constitute a "special factor" that prevents them from seeking relief for the invasion of their constitutional rights through a Bivens cause of action. Pet. App. a-8 to a-11. The remedies identified by the court include provisions from several statutory schemes, including the Lloyd-La Follette Act,

the Back Pay Acts of 1948 and 1966, and the Civil Service Reform Act of 1978. Id. at a-9. The difficulty with such an approach, however, is that it reviews congressional enactments under an inappropriate portion of the Carlson test. Carlson makes clear that courts are to review actions of Congress under the "alternative remedy" branch of the test. 446 U.S. at 18-19. The other branch, "special factors counselling hesitation," as demonstrated above, comes into play only in the event that a Bivens cause of action will interfere with constitutional prerogatives. See Sonntag v. Dooley, 650 F.2d 904, 907 (7th Cir. 1981).

By confusing the two branches of the test, the court of appeals rendered ineffective this Court's carefully delineated formulation concerning the circumstances under which the existence of a statutory remedy may warrant the pre-emption of an otherwise

available Bivens cause of action -- i.e., only when a defendant demonstrates that the remedy in issue is equally effective as a Bivens action and Congress has explicitly declared the remedy to be a "substitute" for a Bivens action. 446 U.S. at 18-19. Consideration of a statutory remedial scheme under the "special factors" branch is directly contrary to the teaching of Carlson.

Even if the statutory remedies in issue could somehow be considered under the "special factors" analysis, those remedies plainly do not satisfy its requirements. First, the statutory remedies in no way meet the requirements of the "alternative remedy" branch of the Carlson test. See pp. 45-56 infra. It would defy logic to conclude that a statutory remedy that does not qualify as a congressionally-mandated substitute for a Bivens action could nevertheless achieve the same effect by masquerading as a "special factor" under the other part of the Carlson formulation.

Second, the court of appeals' concern as to the relationship between the statutory and Bivens remedies centered on the possibility that the option of a Bivens remedy "might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief . . . ." Pet. App. a-10. The court of appeals' fear is unfounded because the two remedies serve very different functions, provide different forms of relief, and are directed against different defendants. A Bivens action, brought against individual federal officials for money damages, cannot reinstate a wrongfully discharged employee or restore an aggrieved employee like petitioner to a formerly-held grade. Only pursuit of the administrative remedy, where the agency itself is a party, can furnish such relief. The two remedies are

neither equivalent nor duplicative, 5/ and may have to be jointly pursued to obtain complete relief. 6/

Finally, the court of appeals perceived that confirmation of federal employees' right

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5/ Of course, the out-of-pocket loss component of an employee's Bivens damages may include back pay, which is also available under the statutory remedy. This common element in no way renders the two remedies identical. A court or agency need only guard against double recovery.

6/ A close cousin to the "bypass" argument is the possibility that an avalanche of lawsuits, many of them frivolous, will result if the Bivens remedy for federal employees is confirmed. But constitutional rights are the cornerstone of our system of government; a citizen who claims a violation of those rights should not be turned away from the courthouse door solely because of a scarcity of judicial resources. "[B]udgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." Bivens, 403 U.S. at 411. (Harlan, J., concurring).

Moreover, the Court's decisions in Butz, supra, and Harlow, supra, make clear that insubstantial claims should and can be dealt with at the threshold through application of the rules of civil procedure. 438 U.S. at 507-08; 102 S. Ct. at 2736-38.

to a Bivens action "would [ultimately] provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights." Pet. App. at a-11. If this conjectured disincentive on the part of Congress were allowed to defeat a Bivens action, no Bivens action would ever be permitted where Congress has provided a partial, inadequate remedy. Indeed, Congress' failure to act is a basis for confirming a plaintiff's right to bring a Bivens action, not a basis for defeating that right. Should Congress wish to substitute another remedy for a Bivens remedy in a particular setting, it need only provide a true substitute and so declare its intent. Carlson, 446 U.S. at 18-19.

C. The Status of Federal Employees Is Not a "Special Factor."

Just as the existence of partial administrative remedies does not defeat the right of civil servants to recover damages for the

violation of the First Amendment right to free speech, so, too, their status as federal employees does not detract from their entitlement to pursue Bivens actions. The imperatives of federal service in no way diminish the responsibility of federal officials to observe the constitutional rights of their subordinates, and no consideration of efficiency in the administration of federal programs mandates that they be relieved of personal accountability for unconstitutional misconduct. The court of appeals' opposite conclusion misconceives the character and realities of federal employment and must be rejected.

Underlying the decision below is the view that there is something "fundamentally different" about the relationship between government supervisors and their subordinates, Pet. App. at a-6 to a-7, and that, on account of this difference, civil servants should be

denied the opportunity, already available to their state counterparts and even to fellow employees of the legislative branch, to recover damages for the invasion of their constitutional freedoms. To be sure, the efficient performance of government functions entails the oversight and direction of public servants to a degree significantly different than the government's relations with private citizens. But there is nothing about the federal government's relationship with its employees that renders their constitutional rights less worthy of protection than those of the rest of the public. As this Court observed in Butz, "we see no substantial basis for holding, as the United States would have us do, that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution . . . ."

438 U.S. at 507. This observation should apply to federal officials' conduct toward their subordinates as well as toward the public at large.

If anything, the need for safeguarding constitutional rights is that much more compelling in the case of civil servants. The very degree of dependence and control that distinguishes the employer-employee relation from the government stance towards the public places employees in greater jeopardy of loss of constitutional freedoms at the hands of overbearing federal officers. "Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale." Butz, 438 U.S. at 506.

The court of appeals' answer to the heightened threat of injury faced by federal employees is to disregard it altogether and to take refuge in the government's "traditional" role of exercising the "widest latitude in the 'dispatch of its own internal affairs.'" Pet. App. at a-7. The court of appeals, citing Sampson v. Murray, 415 U.S. 61, 83 (1974) and Arnett v. Kennedy, 416 U.S. 134, 155 (1974), cases that have nothing to do with the availability of a cause of action for remedying the violation of substantive constitutional protections, treated this "tradition" as one empowering the government to override the exercise of these freedoms by persons in federal service and as one that commands the courts to give rigid deference to the government's chosen means of handling personnel matters. According to the court of appeals, affording federal employees access to the courts and the op-

portunity to recover damages from their superiors for unconstitutional conduct poses too great a threat to the government's need for autonomy in regulating federal employment.

In this regard, the court of appeals' view harks back to a bygone era when government service was relegated to the status of a "privilege" subject to limiting conditions and the suspension of ordinary rights of citizens. See, e.g., McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892) (Holmes, J.). An unbroken chain of later cases has disavowed this "traditional" view of public employment. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) and cases cited therein. Indeed, these cases establish that the traditional role of government in regulating public service is one of respect for, not disregard of, constitutional liberties.

The Court's decision in Davis v. Passman is especially instructive. That case presented the question of whether Congress' traditional autonomy over its internal affairs counselled against providing a Bivens action for an injured congressional employee. Even though Davis implicated significant separation of powers considerations not present in the case of suits by civil servants, the Court upheld the employee's right to pursue a damage remedy, recognizing that "a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counselling hesitation . . . ." Id. at 246.

The decision below also conflicts with other "traditions" about how citizens may go about redressing constitutional wrongs. Bivens, Butz, and Davis all are rooted in the view that ours is a system where "'[n]o officer of the law may set the law at defiance with impunity'"; 7/

7/ Butz, 438 U.S. at 506; Davis, 442 U.S. at 246.

where "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury'"; [8/] and where "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." [9/] The court of appeals decision ignores this time-honored tradition and, in the name of self-regulation of federal employment, closes the courthouse doors to federal employees seeking to establish personal accountability for the invasion of their most fundamental liberties.

Moreover, the right to pursue a damage action is one that this Court has jealously safeguarded for employees of state government.

8/ Bivens, 403 U.S. at 397; Davis, 442 U.S. at 242.

9/ Bivens, 403 U.S. at 395; Davis, 442 U.S. at 245.

See, e.g., Monell v. Dept. of Social Servs. of New York, 436 U.S. 658 (1978). In Butz, the Court stressed that the standards of liability of federal officials for unconstitutional conduct should not deviate from those applicable to "state officials when sued for the identical violation under [42 U.S.C.] § 1983. . . . Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers." 438 U.S. at 500-01 (emphasis in original). Yet acceptance of the court of appeals' conclusion gives federal officers dealing with their subordinates an absolute immunity from liability that is not shared by their state counterparts.

The same kind of anomaly results from singling out federal employees from private citizens injured by the unconstitutional misconduct of federal officials. Read together, Bivens, Butz, and Carlson confirm

that in conducting the business of government, federal officers owe a duty, enforceable by an action for damages, to observe the constitutional rights of members of the public. The effect of the court of appeals' approach, however, is to skewer this requirement of obedience to the law and to afford federal officers an absolute shield from liability for actions relating to their subordinates and a qualified immunity for actions taken in relation to other citizens.

Contrary to the decision below, this kind of disparity cannot be validated on the ground that Bivens actions will impair the efficient administration of federal programs. In Butz, the Court concluded that "Scheuer [v. Rhodes, 416 U.S. 232 (1974)], and other cases have recognized that . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 438 U.S.

at 506-07. The Court noted that Scheuer held that the broad scope of official responsibility and the necessity of acting decisively in performing essential government functions -- the very factors emphasized in the decision below -- do not justify erecting an absolute bar to suits seeking redress for constitutional deprivations. Id. That same reasoning applies here. Federal officers no more require absolute protection for the exercise of their discretion over personnel matters than they do for conducting the remainder of the business of government.

The suggestion that individual accountability will lead to functional paralysis has a demonstrably hollow ring. The court of appeals offered no empirical support for this time-worn rationalization. If the theory had any force, the operations of state government (since Scheuer), federal agencies (since Butz), and congressional offices (since Davis) would

have been crippled. The absence of any evidence of harm to governmental interests belies this cry of wolf. 10/

In any event, the governmental interest in recruiting and retaining qualified managers and in assuring that these individuals have the freedom of action they need to conduct internal government affairs does not warrant a blanket exemption from personal accountability. In Butz, the Court resolved this very question in favor of individual responsibility, holding that qualified immunity offered adequate protection to "officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." 438 U.S. at 506.

10/ Even if there was "evidence" demonstrating a tension between effective administration and respect for constitutional rights, the loss in efficiency is not too dear a price to pay to assure obedience to this nation's fundamental laws.

The government's interests received even greater solicitude in Harlow's reformulation of the qualified immunity standard. In Harlow, the Court reiterated its view that "qualified immunity [offered] the best attainable accommodation of competing values," 102 S. Ct. at 2736, and adjusted the standard to insure that federal officials are shielded from the rigors of trial and liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 2737. This reformulation of the qualified immunity test provides ample protection for the resolute exercise of official discretion. This is true whether the discretion relates to actions affecting the public at large or, as in the instant case, to internal agency matters. The court of appeals' opposite conclusion overturns this Court's careful resolution of the discretion issue and elevates

the government's need for autonomy in conducting its own affairs to heights never before recognized in the decisions of this Court.

D. The Nature of the Substantive Right at Stake in this Case -- the First Amendment Right to Free Speech -- Is Not a Special Factor.

The final "special factor" identified in the decision below is that the nature of the substantive right here at stake, the First Amendment right of civil servants to speak out on public issues, requires that petitioner's Bivens remedy be defeated. Pet. App. a-7 to a-8. In so finding, the court of appeals relied on Pickering v. Board of Education, 391 U.S. 563 (1968), where this Court held that in regard to the free speech right of government employees, a balance must be struck between the interest of the employee in the exercise of those rights,

and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568. The decision below reflects the view that the nature of federal employees' right to free speech and the balancing process used in determining the character of that right constitutes a "special factor." This conclusion is without merit.

The decisions of this Court, in a wide variety of settings, make clear that First Amendment rights are subject to elaborate balancing of competing interests. The balancing analysis used in employee cases like Pickering is no different in principle from that called for by the Court's other First Amendment cases. Thus, the fact that speech of federal employees like petitioner is subject to a weighing of competing interests is not "special," and cannot justify the side-

stepping of judicial resolution of fundamental constitutional issues.

Indeed, if the character of First Amendment rights has any relevance in the analysis to be undertaken by this Court, it must be as an element weighing in favor of confirming petitioner's Bivens cause of action. Safeguarding the right to free speech on the part of federal employees is critical to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The public's interest in First Amendment contributions by federal employees far outweighs any advantages that might be gained by affording executive officials a blanket exemption from personal accountability for their abuses of power. It does so for three reasons.

First, federal employees are an important source of information for the public at large about the operations of government. In Pickering, where a public school teacher spoke out concerning the operation and funding of the school system that employed him, this Court found that

> [o]n such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 571-72.

The same is true for federal employees, for they often possess knowledge about the workings of government unavailable to the general public. Their information is no less "vital to informed decisionmaking."

Second, federal employees can make a significant contribution to effective congressional oversight of executive functions. As this Court has recognized, the ability of Congress to discharge its duties is directly related to the quality of information made available to Congress. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975); McGrain v. Daugherty, 273 U.S. 135, 175 (1927). Federal employees who speak out thus "provide valuable assistance to Congress in its fulfillment of its oversight responsibilities." See Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 857 (statement of Senator Ribicoff).

Third, the public statements of civil servants can be critical to the efficiency of the executive branch itself:

> [F]reedom of expression on the part of government employees can play an important role in counteracting those stultifying forces which customarily pervade bureaucracy. Organizational pressures toward dullness and conformity in the public service can perhaps be partly overcome by establishing firm principles that encourage, or at least protect, diversity in opinion and discussion.

T. Emerson, The System of Freedom of Expression 564 (1970).

Furthermore, when actions taken in retaliation against one federal employee who speaks out go unredressed, the chilling effect on others' exercise of the right to free speech is severe. Fitzgerald v. Hampton, 383 F. Supp. 823, 825 (D.D.C. 1974). The same is true if it is perceived that the available statutory remedies offer inadequate protection or relief to employees who are willing to put conscience over career and speak out on issues of public concern. The availability of a Bivens action serves to preserve and promote free, open speech and debate on national issues among federal employees who all too frequently are confronted with this unenviable choice. Far from being a

"special factor" that would defeat the damage remedy, the right to free speech speaks most strongly in favor of such a remedy.

II. Congress Has Passed No Law Depriving Federal Employees of the Bivens Cause of Action.

In its supplemental brief filed on remand to the court of appeals, the government argued that there is in fact a statutory scheme that fulfills the second part of the Carlson test and preempts the Bivens action that would otherwise be available to petitioner. 11/ That scheme is said to emerge from various provisions of the Lloyd-La Follette Act, as amended; the Veterans Preference Acts of 1944 and 1948; Executive Orders No. 10988 and 11491 (1962); and the Back Pay Act of 1966. See

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11/ Although the court of appeals did not reach this argument, the government may nevertheless use it to defend the decision below, California Bankers Ass'n v. Schultz, 416 U.S. 21, 71 (1974), and will likely do so.

Supp. Br. at 34. The government finds additional support for its position in the Civil Service Reform Act of 1978 ("CSRA"). Supp. Br. at 19-26, 34 n.12. Although the CSRA was not effective at the time of respondent's demotion of petitioner, the government argues that the CSRA was comprehensive legislation that essentially continued the remedies that were available to petitioner under prior law, id. at 21, and, therefore, was relevant to congressional intent as to the availability of a Bivens action. Id. at 34 n.12.

Try as it may, however, the government cannot, as required by Carlson, carry the burden of demonstrating that Congress "provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18-19 (emphasis in original). The remedial scheme on which it relies is in no way comparable, much less "equally effective," to a Bivens cause of action.

A. The Fullest Measure of Administrative Relief Cannot Substitute for a Bivens Remedy.

Under the procedures in effect at the time of petitioner's demotion, the full extent of petitioner's statutory remedies were "specific notice and review procedures," reinstatement to his former grade, and back pay. 12/ Pet. App. a-9. This administrative relief pales beside remedies available through a Bivens cause of action. The Carlson Court cited four factors that supported

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12/ Petitioner did in fact pursue these remedies and was reinstated to his former grade with pay. Id. Had the CSRA governed petitioner's rights, he would have been entitled to no greater relief. Under the provisions of the CSRA, respondent's action taken against petitioner, as alleged, constituted a "prohibited personnel practice." See 5 U.S.C. § 2302(b)(8)(A). A "prohibited personnel practice" is to be remedied by "corrective action." See id. § 1206(c)(1)(B). Although the parameters of "corrective action" are not clear, reinstatement and back pay are available remedies. See In re Robert J. Frazier, MSPB Order No. SCC-80-1 (1979). The CSRA does not authorize money damages of any sort and the government does not claim that such damages are available under the statute.

the conclusion that the Bivens remedy is more effective than the remedy available under the Federal Tort Claims Act ("FTCA"), the statute under consideration in Carlson. These four factors are Bivens' deterrent effect, the availability of punitive damages, the right to trial by jury, and uniformity of standards for vindicating constitutional rights. 446 U.S. at 20-23. The case before the Court adds one significant, additional factor, the availability of compensatory damages. 13/

Compensatory Damages. Unlike the FTCA in Carlson, the statutory scheme applicable to federal employees makes no provision whatever for compensatory damages for the harm suffered, other than the limited back pay

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13/ No one difference between the Bivens remedy and the statutory remedy under scrutiny "need independently render the [statutory remedy] inadequate. It can fail to be equally effective on the cumulative basis of more than one difference." Carlson, 446 U.S. at 22 n.10.

remedy. Under this scheme, even civil servants who prevail in administrative proceedings cannot be made whole. But when constitutional rights are violated, compensation is appropriate for any harm suffered, intangible injury as well as out-of-pocket loss. Halperin v. Kissinger, 606 F.2d 1192, 1207 (D.C. Cir. 1979), aff'd by an equally divided court, 453 U.S. 928 (1981) (Fourth Amendment Bivens action); Paton v. La Prade, 524 F.2d 862, 870-72 (3d Cir. 1975) (First Amendment Bivens action); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970) (action brought under 42 U.S.C. § 1983). In cases such as this one, a plaintiff may be able to recover substantial compensatory damages beyond back pay for the pain and suffering endured through the abusive actions of superiors. 14/

14/ The question of compensation of intangible injury is, of course, distinct from the issue that concerned this Court in Carey v. Piphus, 435 U.S. 247 (1978). Carey held that in the absence of proof of actual injury, a plaintiff (continued on next page)

Moreover, when the violation giving rise to damages is one of the right to free speech, that right's "preferred position" in the hierarchy of constitutional freedoms, Kovacs v. Cooper, 336 U.S. 77, 88 (1949), forbids a grudging approach in the assessment of such damages:

> The vindication of [First Amendment] rights warrants more than token acknowledgement . . . . Compensatory damages embrace more than recompense for monetary injury . . . as is evident from amounts for pain, suffering and humiliation. Compensation for denial of First Amendment rights should not be extravagant . . . . [but] should not be approached in a niggardly spirit. It is in the pub-

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(footnote continued)
alleging violation of due process rights may receive only nominal damages. Id. at 264-67. Intangible injuries are, of course, no less "actual" than out-of-pocket loss; they merely require different methods of proof. See generally D. Dobbs, Handbook on the Law of Remedies § 8.1, at 544-51 (1973) (measurement of pain and suffering damages). Carey also differs from the instant case in that it concerned procedural rights rather than the substantive right at stake here. See Halperin, supra, 606 F.2d at 1207 n.100.

> lic interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right . . . .

Tatum v. Morton, 562 F.2d 1279, 1282 (D.C. Cir. 1977). See id. at 1286-87 (Wilkey, J., concurring).

The statutory remedy claimed by the government to be "equally effective" to the Bivens remedy is lacking this critical element of compensation.

Bivens' Deterrent Effect. In Carlson, this Court stated that "[i]t is almost axiomatic that the threat of damages has a deterrent effect, . . . surely particularly so when the individual official faces personal liability." 446 U.S. at 21. This observation reflects the common sense view that accountability is the strongest motivator for government officials. A Bivens remedy serves this objective, whereas the statutory scheme relied on by the government does not.

The government argued below that supervisory federal personnel are sufficiently deterred from committing unconstitutional acts by (a) a desire to avoid scrutiny of their "management decisions" by their superiors, and (b) the disciplinary sanctions provided by the CSRA through the Merit Systems Protection Board ("MSPB") and its investigatory arm, the Office of Special Counsel. Supp. Br. at 37 n.15. The first factor cannot be seriously regarded, for Congress, in creating the MSPB and its Special Counsel, obviously thought that the mere desire on the part of a supervisor for career advancement was not sufficient protection for those employees under his control. In regard to the Special Counsel, the performance of that office has to date been seriously deficient. 15/ When

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15/ In three and one-half years of operation, the Special Counsel "has yet to win a case before the [MSPB] establishing that a whistle blower's rights have been violated." 68 A.B.A. J. 1065 (Sept. 1982).

prosecution is unlikely or incompetent, lawless conduct is encouraged, not deterred.

Punitive Damages. The Court stated in Carlson that punitive damages are available in a "proper" 42 U.S.C. § 1983 action and that culpable federal officials should face the same liability as their state government counterparts. 446 U.S. at 21-22. Thus, the statutory prohibition of punitive damages in an FTCA suit renders that remedy "that much less effective than a Bivens action as a deterrent to unconstitutional acts." Id. at 23. Indeed, a remedial scheme that permits "juries and courts to assess punitive damages in appropriate circumstances against the offending official based on his personal finances, . . . directly advances the public's interest in preventing repeated constitutional deprivations." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981). By

contrast, the statutory remedies available to injured civil servants lack provisions authorizing punitive damages, and a Bivens action is therefore necessary to insure deterrence.

Jury Trial Option. Like the FTCA in Carlson, id. at 22-23, the statutory remedies urged by the government do not offer the opportunity to choose a jury trial. As in Carlson, this factor weighs against any contention that the statutory remedies here at issue can substitute for a Bivens remedy.

Uniformity of Standards for Vindicating Constitutional Rights. The Carlson Court found a Bivens action preferable to an FTCA suit because, in part, the Constitution would be the yardstick by which federal officials' conduct would be measured, rather than "the vagaries of the laws of the several States." Id. at 23. This precise issue of uniformity is not present in this case. Constitutional standards should apply regardless of whether

federal employees are left to their statutory remedies or are permitted to maintain Bivens actions. But what is at issue is who will apply constitutional standards to the claims of such employees. The choice is between federal district judges and administrative hearing officers, and it is the former who routinely adjudicate constitutional questions. Moreover, federal judges' primacy in the area is beyond question. As this Court stated in Davis, 442 U.S. at 241, "[t]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced."

In addition, federal judges are insulated by Article III's tenure and salary provisions, 16/ but administrative hearing officers have neither of those critical protections. Indepen-

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16/ See generally Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2864-66 (1982).

dent district judges are clearly to be preferred over federal employees at the mercy of their superiors and the political winds.

The likelihood of uniform and faithful application of constitutional standards is consequently greater when the federal judiciary, rather than administrative personnel, is considering claims of injury.

B. Congress Has Not Provided a Remedy that It Has "Explicitly Declared to Be a Substitute" for a Bivens Action.

In light of the wide disparity between a Bivens action and the administrative remedies in issue, it is not surprising that the government, like the Carlson defendant, can "point to nothing in the [statutory scheme] or its legislative history to show that Congress meant to preempt a Bivens remedy or create an equally effective remedy for constitutional violations." 446 U.S. at 19. The government's inability

to do so is a telling admission because in comprehensively reforming the civil service laws in 1978, Congress did not pre-empt the well-established Bivens remedy. If Congress, in its "fine tuning" of civil service remedies, [17] had intended to supplant existing judicial remedies, one would expect to find clear indication of such an intent. The absence of any congressional consideration is dispositive in petitioner's favor because "[s]uch silence is far from 'the clearly discernible will of Congress,'" Davis, 442 U.S. at 247, that Carlson requires to extinguish the Bivens cause of action.

Before the court of appeals on remand, the government sought to mask its failure to carry the required burden by standing the Carlson test on its head. The government ad-

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17/ See Pet. App. a-9.

vanced an interpretation of Carlson that would defeat a Bivens cause of action unless explicit statutory provisions or legislative history evidenced a congressional intent to preserve an action for damages. Judged under that interpretation, the government contends, there is no Bivens cause of action for federal employees because there is no "language preserving a Bivens remedy in the civil service statutes and regulations, nor in the legislative history." Supp. Br. at 36.

Less fidelity for the standard laid down in Carlson is difficult to imagine. The government does not apply the Carlson test -- the need for an adequate substitute and an explicit congressional declaration that a substitute for Bivens is provided -- but concocts one of its own: A Bivens action is only available if, when Congress legislates in the general area, it specifically declares support for the existing judicial remedy. This approach

is directly opposite to the Carlson holding, which requires defendants to demonstrate that Congress deliberately intended to extinguish the pre-existing Bivens remedy in favor of a substitute, equally effective statutory remedy. This the government cannot do.

CONCLUSION

The decision of the court of appeals should be reversed and the summary judgment vacated, and this case should be remanded to the district court for further proceedings on the merits of petitioner's claims.

Respectfully submitted,

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